No. 3886

In the United States Circuit Court of Appeals

For the Ninth Circuit

K. HIRATA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge Presiding.*

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

Plaintiff in error was charged by indictment with violation of the Harrison Narcotic Act [Act December 17, 1914, Chap. 1, Sec. 1, as amended (Comp. Stat. Sec. 6287-G)]. The indictment was laid in two counts, in the first of which plaintiff in error was charged with having on the 6th of July, 1921, "unlawfully and not in the original stamped package or from the original stamped package" pur-

chased some 342 grains of morphine and over 1½ ounces of cocaine. In the second count plaintiff in error was charged with unlawfully "selling, dealing, dispensing, and administering" narcotic drugs on the same day. The case came on duly for trial on the 30th of November, 1921, before the Honorable Jeremiah Neterer, Judge of the United States District Court of the Western District of Washington, Northern Division. Prior to the calling and impaneling of the jury, but after the case had been called for trial, counsel for plaintiff in error interposed his motion for return of evidence and suppression of the same. (Tr. pp. 9 and 10). The ground for the motion was that the premises in question were entered by the arresting officers and the seizure of the narcotic drugs made without a search warrant. The motion was overruled by the court on the ground that it was made at too late a date. (Tr. p. 11).

At the trial the following facts were developed:

On the 6th of July, 1921, certain police officers of the City of Seattle made arrangements with a girl addict to approach the plaintiff in error, who was a Japanese then residing at the Hub Hotel, Seattle, Washington, for the purpose of purchasing narcotic drugs from him (Tr. p. 12). N. P.

Anderson, one of the police officers, concealed himself in a bathroom on the third floor of the Hub Hotel and could hear the plaintiff in error talking to the girl addict on the second floor of the hotel just below him (Tr. p. 12). The other policeman, R. F. Baerman, was stationed on the outside of the hotel and saw the plaintiff in error and the addict meet in the office of the hotel on the mezzanine floor (Tr. p. 15). The arresting officers had previously given the addict $3.00 in marked money with which to make the purchase (Tr. p. 15). Shortly afterwards plaintiff in error came running up the steps from the second floor to the fourth floor of the hotel, where he walked to the front of the building and was seen to enter a room on the right hand side (Tr. pp. 12 and 13). In about two minutes plaintiff in error went down the steps to the second floor, where he again engaged in conversation with the addict. Thereafter the addict went out of the hotel with a package of morphine in her hand which she handed to Officer Baerman (Tr. p. 15). This officer immediately went inside the hotel and found the plaintiff in error, who had a can of money containing silver dollars and a five-dollar bill and a ten-dollar bill, which he threw away. Plaintiff in error was then put under arrest and

searched. The three marked one-dollar bills hereinabove referred to were taken from his person (Tr. pp. 15 and 16). At this time plaintiff in error admitted that he had sold the morphine to the addict and wanted to fix it up right away, saying, "I haven't got any more." (Tr. p. 16). Plaintiff in error was then taken to the room on the fourth floor which he had previously been seen to enter. (Tr. p. 13). It was noticed that the carpet on the floor of the room was not stretched very tight, and one of the police officers pulled the carpet back and found two boards that were out and worn from use. These boards were lifted up, revealing a cigar box and a woman's stocking containing the narcotic drugs, more particularly described in the indictment (Tr. p. 16). The packages of narcotics found in this cache corresponded to the package the girl addict had in her hand when she came out of the hotel (Tr. p. 17). Shortly after the arrest plaintiff in error attempted to bribe the arresting officers, and went so far as to make out a check for $225 to be given to the arresting officers in case they would let him go. (Tr. pp. 16 and 17).

Counsel for plaintiff in error at the time the drugs were offered into evidence by defendant in error again objected to their admission in evidence

on the ground that "There was no search warrant shown for the arrest of this man in the first instance, no search warrant as required by law." The objection was again overruled (Tr. p. 17). At the conclusion of the trial the jury returned with a verdict finding the defendant guilty on both counts of the indictment.

Plaintiff in error assigns as error the district court's refusal to pass on his motion for return of evidence and suppression of same, and this is the only question intended to be raised by the assignments of error.

ARGUMENT

The district court's refusal to consider plaintiff in error's motion for return and suppression of evidence was not reversible error for several reasons.

1. The motion was not timely made.

2. The evidence showed that the seizure was made by state officers, and hence could be adopted by the federal government whether legal or illegal.

3. There was no offer or attempt at any time on the part of the plaintiff in error to show connivance at, or participation in, the seizure by the fed-

eral officers, and hence plaintiff in error is in no position to urge error.

We discuss the points above made and relied on by us in the order raised.

I.

The seizure complained of took place on July 6, 1921 (Tr. p. 12). The motion for suppression and return of the property seized was not made until November 30, 1921, after the case had been called for trial (Tr. p. 9). Assuming that the narcotic drugs were taken without warrant or right in law, still that affords no legal objection to their admissibility in evidence where the application for their return and suppression as evidence was not filed within a reasonable time after the seizure. The court will not delay a criminal trial to inquire into a collateral issue as to whether evidence otherwise competent was lawfully obtained. Your Honors so held in the case of *Lyman v. United States*, 241 Fed. 945 (C. C. A. 9th Circuit), using the following language (241 Fed. at pages 948-9):

> "In the case of *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, it was adjudged, among other things, that the fact that papers which are pertinent to the issue may have been illegally taken from the

possession of the party against whom they are offered is no valid objection to their admissibility; that the court considers the competency of the evidence, and not the method by which it was obtained—citing, among other authorities, with its approval, the following from Greenleaf on Evidence (volume 1, Par. 254a):

'It may be mentioned in this place that, though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'

"In the late case of *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the Supreme Court, while holding that the federal courts cannot, as against a seasonable application for their return, in a criminal prosecution, retain for the purposes of evidence the letters and correspondence of the accused, seized in his house, during his absence and without his authority, by a United States marshal holding no warrant for his arrest or for the search of his premises, still adhered to the rule laid down by it in *Adams v. New York*, to the effect that a collateral issue will not be raised to ascertain the source of

competent evidence, although illegally obtained, where no application has been made by the accused for its return before trial.

"In the present case it is not pretended that any such application was made on behalf of the plaintiff in error for the return of the records and papers, to the introduction of which objection was made on the trial, notwithstanding they had been seized, according to the statement contained in the brief for the government, more than two years before the trial took place; and that the records and papers so offered and received in evidence strongly tended to show the alleged guilt of the defendant to the indictment is not even questioned. We therefore are of the opinion that the trial court was right in its ruling admitting the evidence complained of."

The holding of the *Lyman case, supra,* has since been approved and followed in:

Rice v. United States, 251 Fed. 778 (C. C. A. 1st Circuit),

United States v. O'Dowd, 273 Fed. 600 (D. C.).

Directly in point is the case of the *State of Washington v. Dersiy,* 21 Wash. Dec., page 294; 208 Pac.: There the defendant was charged with the unlawful possession of intoxicating liquor. Immediately after the calling of the case for trial, and when the court was ready to make up a jury, but before any

prospective jurors had been called, the defendant moved the court to require the return of the liquor to him, and to suppress it as evidence in the case on the ground that it had been seized without a search warrant. The trial court declined to hear this motion for the reason that it was not timely made, and the defendant urged this ruling of the court as error on the appeal.

In disposing of this contention the Supreme Court of the State of Washington said (21 Wash. Dec. at pages 295 and 297):

> "When a case of this character is called for trial, the court is not required at that time to try out and investigate the circumstances under which the liquor was taken to determine whether it was admissible in evidence * * *. It may be conceded that circumstances may arise where it would be the duty of the court to stop in the midst of a trial and determine this collaterial question, but the facts here do not present such a case. In any event, it is admitted by the appellant that, during the forenoon of the day before the case was called for trial, he learned for a certainity that the seizure had been accomplished without any search warrant. It was his duty, immediately upon obtaining the information, to make his motion to suppress the testimony and have it brought before the court. There is no showing why he did not do this. We find nothing in

> the record which would excuse the appellant from presenting his motion at an earlier period."

The cases of *Gouled v. United States*, 255 U. S. 298; 41 Sup. Ct. Rep. 61; 65 L. E. 647, and *Amos v. United States*, 255 U. S. 313; 41 Sup. Ct. Rep. 266; 65 L. E. 654, cited by counsel as sustaining a contrary position are not in point.

In the *Gouled case, supra*, the lower court's refusal to sustain the objection to the admission in evidence of certain papers was sought to be upheld on the ground that the objection having been made for the first time at the trial was not seasonable. The Supreme Court said (255 U. S. page 305; 65 L. E. at page 651):

> "The objection was not too late, for, coming, as it did, promptly upon the first notice the defendant had that the government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable."

There is here no contention that plaintiff in error was surprised at the government's possession of the narcotic drugs or their introduction into evidence at the trial. The *Gouled* case then, instead of being authority for counsel's position, distinctly

recognizes the rule here relied upon by the government. The *Amos case, supra,* was decided on the same day as was the *Gouled* case, and both the opinions are by Mr. Justice Clarke. The reasons underlying the holding in the *Gouled* case are by a brief reference incorporated into the *Amos* decision, and the *Amos* case is therefore distinguishable upon the same grounds.

II.

Still assuming the search for and seizure of the narcotic drugs to have been without warrant or right in law, it does not follow that their interoduction in evidence was violative of plaintiff in error's rights under either the Fourth or Fifth Amendments to the Federal Constitution. The former of these amendments prohibits unlawful searches and seizures, but is a limitation *only* upon the actions of the officers of the United States. The narcotic drugs, having been seized by state officers, were admissible in evidence in a federal court regardless of whether the original taking was legal or illegal.

Burdeau v. McDowell, 256 U. S. 465; 41 Sup. Ct. Rep. 574; 65 L. E. 1048,

Kanellos v. United States, 282 Fed. 461 (C. C. A. 4th Circuit),

M'Grew v. United States, 281 Fed. 809 (C. C. A. 9th Circuit).

Plaintiff in error can find no comfort in the case of *United States v. Falloco*, 277 Fed. 75 (D. C.), which holds that evidence obtained by a state officer by unlawful search is incompetent in a federal court if a federal officer co-operated with a state officer in the unlawful search. This doctrine has no application here because there is an entire absence of evidence of participation or co-operation by a federal officer—in fact, the record affirmatively shows that, "There were no federal agents in the case and no federal agents or officers present when the arrest was made, or the search was made. That the girl addict was assisting the police officers and was not a federal agent." (Tr. p. 14). As the record now stands the district court could have done nothing but admit the proffered narcotic drugs in evidence, for the testimony was clear that the seizure was made by state officers without the participation or co-operation in any way by federal agents.

III.

At no time in this case, either before or during the trial, was any objection made to the use of the narcotic drugs as evidence other than that they had been seized without a search warrant. Counsel asserts on page 7 of his brief his ability to have

established that the arresting officers were acting under the supervision and in conjunction with the federal authorities. The record is devoid of any offer or attempt on his part to make such proof, and as before stated at the time the narcotic drugs were offered in evidence there was direct testimony that the seizure had taken place without co-operation or assistance of federal agents. The district court therefore, was clearly justified in assuming that counsel's only objection to the introduction of the narcotic drugs was the fact that they had been seized by police officers. We cannot now presume that had plaintiff in error attempted at any time to show that the arrest and seizure were made with the connivance and co-operation of the federal authorities that the district court would have refused to admit such proof. On the contrary the presumption is that had such an offer of proof been made, the court would have admitted testimony to substantiate it.

IV.

With reference to the point raised in plaintiff in error's brief as to the sufficiency of evidence to sustain count 2 or the "sale" count of the indictment, it is only necessary to make reference to the Transcript of Record (pages 12 to 19) which,

besides pointing conclusively to a sale of narcotic drugs by plaintiff in error as charged, contains an admission as to the making of the sale by him.

It is respectfully submitted in view of the authorities herein cited that the judgment of the district court should stand affirmed.

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